IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VIRGIL ADDISON-EADY Plaintiff, v. THE PHILADELPHIA PARKING AUTHORITY Defendant.	:	CIVIL ACTION NO. 04-4392

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

INTRODUCTION.

On or about May 14, 2003, defendant The Philadelphia Parking Authority ("PPA") terminated the employment of plaintiff Virgil Addison-Eady ("Addison-Eady"), as a PPA Parking Enforcement Officer ("PEO"). This was prompted by PPA's discovery that Addison-Eady's driver's license had been suspended on May 30, 2002, that Addison-Eady had not notified PPA of the suspension, and that he had been working without a valid license, all in violation of rules applicable to Addison-Eady and other PEOs, who are represented by a union for purposes of collective bargaining.

There is no dispute that Addison-Eady's driver's license was suspended. Addison-Eady claims that he promptly notified PPA of his license suspension, and that PPA therefore unlawfully discriminated against him on the basis of race and retaliated against him for a prior charge of race discrimination filed with the Pennsylvania Human Relations Commission in September, 2002.

Notwithstanding the factual dispute as to whether Addison-Eady notified PPA of his license suspension, it is now clear that PPA is entitled to judgment as a matter of law. Addison-Eady has failed to establish even a prima facie case of race discrimination or retaliation. By Addison-Eady's own admission, PPA did not treat him differently than other PEOs on account of his race. According to Addison-Eady, PPA treated him less favorably than both Caucasians and African-Americans; he identified at least six African-Americans he claims were treated more favorably than him. Moreover, there is no dispute that PPA has terminated other African-American and Caucasian PEOs for the same reasons. Given these facts, there cannot be even an inference of race discrimination, without regard to Addison-Eady's claim that PPA's reason for his termination was false.

Likewise, there is no evidence supporting Addison-Eady's retaliation claim, other than the fact that Addison-Eady happened to file a race discrimination complaint approximately five months before PPA suspended him with intent to discharge. Courts have routinely held that such a delay does not establish the temporal proximity necessary to establish a prima facie retaliation claim. Otherwise, there is no evidence of any pattern of antagonism from which a retaliatory motive could be inferred.

Employees may not substitute discrimination or retaliation claims as a proxy for wrongful discharge claims. This is precisely what Addison-Eady seeks to do in this case, cloaking his argument with the underlying merits of his discharge with the claim of "pretext" when, in the first instance, he cannot establish a prima facie case of race discrimination or retaliation. PPA is entitled to summary judgment and the dismissal of this action with prejudice.

FACTUAL BACKGROUND.[1]

A. Addison-Eady's Employment As A PEO Prior to 2002.

PPA is an agency of the Commonwealth of Pennsylvania charged with administering the parking regulations of the City of Philadelphia, and maintaining various parking lots and garages (including the garages at Philadelphia International Airport). [See Complaint, ¶ 3 (App 112-113); PPA's Answer, ¶ 3 (App 222-223).] PPA hired Addison-Eady to work as a Parking Enforcement Officer ("PEO") in or about 1991. [Complaint, ¶ 7 (App 113); D-2 (App 10); Addison-Eady Dep at 9 (App 313).] Addison-Eady was employed as a PEO throughout his

[1]To the extent disputed facts are referenced, they merely provide context. In any event, as explained in the ARGUMENT, infra, this Motion does not require the resolution of any disputed fact, particularly with respect to Addison-Eady's claim that he notified PPA regarding his license suspension. All cited materials are included in the Appendix filed in support of this Motion. Deposition testimony is referenced as "[Witness] Dep at [page]." Documents are referenced as deposition exhibits or, if not marked as deposition exhibits, by subject matter description. Appendix page references are provided as "App [page]."

tenure at PPA, and his job responsibilities — primarily involving the enforcement of Parking laws — essentially remained the same. [Addison-Eady Dep at 9-10 (App 313-314); D-7 (App 99-100).]

As a PEO, Addison-Eady was a member of and represented by American Federation of State, County, Municipal Employees, District Council 33, Local Union No. 1637 ("Union") for purposes of collective bargaining. [Addison-Eady Dep at 10 (App 314); see Collective Bargaining Agreement ("CBA") excerpts (App 215-220).] Addison-Eady served the Union as a shop steward during some periods, and in that capacity was familiar with the contractual progressive discipline system and grievance procedure. [See e.g. Addison-Eady Dep at 53-55, 59, 71, 86-88, 116 (App 324-326, 329, 333).] Pursuant to collectively bargained procedures, PEOs bid for available positions on day or night shifts every six months. [Addison-Eady Dep at 31-33 (App 319); see Letter dated December 16, 2002 and CBA excerpts (App 213-220).]

Addison-Eady was disciplined on numerous occasions long prior to the events leading to his termination. He was suspended on multiple occasions and even previously terminated, then later permitted to return to work by arbitrator, who denied Addison-Eady any back pay. [See D-9 (App 101); D-26 (App 127); D-27 (App 128-129); Arbitration Award dated December 9, 2000 (App 147-172); Addison-Eady Dep at 124-125 (App 342).] There is no allegation of discrimination or retaliation with respect to any of these prior disciplinary actions.

Specifically, in December, 1996, Addison-Eady was suspended for insubordination, a suspension which was imposed despite intervention by the Union through the grievance process. [D-9 (App 101).] On July 15, 1997, Addison-Eady was suspended for insubordination, this time for three days, again notwithstanding the Union's grievance. [D-9 (App 101).] In January, 1998, Addison-Eady was suspended for three days for violation of PPA's sick leave rules. [D-26 (App 127).]

Addison-Eady was disciplined on seven separate occasions during August and September, 1998, for various violations of rules and/or failure to perform his job, including a one day suspension on September 1, 1998, and a three day suspension on September 4, 1998, for failure to follow instructions. [Arbitration Award dated December 9, 2000 at 2-3 (App 149-150).] This culminated in Addison-Eady's termination on September 24, 1998, when he refused to perform his patrol duties due to his expressed concern with radio communication difficulties. [Id. at 3 (App 150).] The Union filed a grievance challenging the termination, and ultimately demanded arbitration. After four days of arbitration hearings, by an Award dated December 9, 2000, the arbitrator allowed Addison-Eady to return to work without any back pay in light of the circumstances and nature of the disciplinary issues. [Id. at 23-25 (App 170-172).] As the Arbitrator concluded:

> "Given [Addison-Eady's] established pattern of insubordinate and unjustified behavior, a serious penalty is warranted.... [G]iven the seriousness of [Addison-Eady's] misconduct, I refuse to order make whole relief." [Id. at 23 (App 170).]

Thus, Addison-Eady was out of work for over two years without pay in connection with this discipline. [Id.; see Addison-Eady Dep at 124-125 (App 342).]

Addison-Eady's disciplinary issues continued after he returned to work. For example, on December 21, 2001, Addison-Eady received a written warning for failure to perform assigned duties. [D-27 (App 128-129).]

B. Addison-Eady's 2002 Race Discrimination Charge.

In or about July, 2002, Addison-Eady was assigned to a night shift PEO position after PPA did not receive a bid sheet completed by Addison-Eady as required by the CBA. Addison-Eady, who had completed a bid sheet on prior occasions when he bid on day shift jobs, claims that on this occasion the sheet "was lost, or wasn't found, or wasn't turned in...." [Addison-Eady Dep at 133-135 (App 344-345).] The Union did not pursue Addison-Eady's grievance of this matter to arbitration. [Id.]

Addison-Eady filed complaints against his Union and PPA on a variety of grounds. Addison-Eady's first reaction, on July 8, 2002, was to file charges with his Union against Anne Cohen, the Union's President, alleging that Cohen was acting in collusion with PPA and that she was violating the CBA because, according to Addison-Eady, "nothing was done in regards to me being placed back in the shift that I was elected to represent [as shop steward]." [D-30 (App 137); Addison-Eady Dep at 142-143 (App 347).] Addison-Eady has no idea of the status of this complaint, although he does not recall ever attending any hearing on his charges before the Union's trial body, as he requested. [Id.]

Next, on or about August 9, 2002, Addison-Eady filed a Complaint against PPA with the Pennsylvania Labor Relations Board ("PLRB"), alleging that PPA assigned him to night shift in retaliation for his activities on behalf of the Union. [Complaint in Addison-Eady v. PPA, No. PERA-C-02-381-E (PLRB)(App 203-205).] PPA denied such allegations, and emphasized that Addison-Eady's assignment was consistent with the procedures specified in the CBA. [PPA's Answer (App 206-208).]

Later, on September 13, 2002, Addison-Eady filed a Complaint ("2002 Charge") with the Pennsylvania Human Relations Commission ("PHRC"), alleging that PPA discriminated against him on the basis of race by "unilaterally and improperly changing [his] work shift..., while simultaneously granting the requests of less-senior white employees...." [D-28 (App 130-134).] Again, PPA denied Addison-Eady's allegations. [PPA's Answer to 2002 Charge (App 209-220).] Ultimately, the PHRC dismissed Addison-Eady's 2002 Charge, finding no probable cause to support the allegations of unlawful discrimination. [Letter from Homer C. Floyd, PHRC Executive Director, dated April 16, 2003 (App 221).]

In January, 2003, Addison-Eady exercised his right to bid on a day shift job, which was awarded to him based on his seniority pursuant to the CBA. [Addison-Eady Dep at 47 (App 323).] This effectively resolved Addison-Eady's complaints against the Union and PPA, as he was back on his preferred day shift position. [See Addison-Eady Dep at 134, 144 (App 345, 347).]

C. Addison-Eady's Termination And Grievance.

At all relevant times, PPA has maintained a policy that requires all PEOs to maintain a valid driver's license. [Addison-Eady Dep at 12-13 (App 314); Fenerty Dep at 11 (App 368); Dickson Dep at 10 (App 358); D-4 at 24-25 (App 38-39); D-7 (App 99-100); see also D-2 (App

10).] PPA requires any PEO who experiences a license suspension to immediately report the facts to his or her supervisor. [Addison-Eady Dep at 13-14, 20-21 (App 314-316); Dickson Dep at 19-20 (App 360); D-4 at 24-25 (App 38-29).] Addison-Eady was aware of and understood these rules. [Addison-Eady Dep at 12-14, 20-21, 41-43 (App 314-316, 321-322); see D-2 (App 10); D-3 (App 11).]

If a PEO follows these rules and appropriately reports a license problem, it is PPA's practice, if possible, to help the employee address the license problem with the Pennsylvania Department of Transportation ("PennDOT"), and to accommodate the employee during the time of the license suspension by assigning the PEO to a patrol which does not require operation of a motor vehicle. [Fenerty Dep at 11-12 (App 368); Dickson Dep at 19-20 (App 360); see PPA's Responses to Second Set of Interrogatories and documents (App 247-310).] Conversely, if PPA learns that a PEO has not appropriately reported a license suspension, it is PPA's practice to suspend the PEO with the intention to terminate the PEO's employment. [Id.]

As a method of enforcing these rules, PPA obtains updated information from PennDOT regarding the driver's license status of its employees from time to time. [Fenerty Dep at 7-10, 13-14 (App 367-369); see PPA License Status Report (App 173-202).] On or about February 26, 2003, in connection with one of these license checks, PPA learned through information provided by PennDOT that Addison-Eady's driver's license had been suspended until January 17, 2005.[2] [D-34 (App 144-146); see PPA License Status Report (App 173-202).] Upon making this discovery, PPA suspended Addison-Eady, with the intention of terminating his employment on March 12, 2003, for his failure to notify PPA that his license had been suspended and would remain suspended until January 17, 2005. [D-13 (App 102); D-14 (App 103).]

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[2]As a result of Addison-Eady's refusal to submit to a chemical test for driving under the influence on November 19, 2000, Addison-Eady received a one year license suspension which he did not receive credit for beginning to serve until January 17, 2003. [D-32 (App 141); D-33 (App 142-143); D-34 (App 144-146).] As a result of Addison-Eady's further violation of driving while his license was suspended on November 30, 2001, Addison-Eady received an additional one year license suspension through January 17, 2005. [D-34 (App 144-146).]

Addison-Eady and the Union filed a grievance challenging this suspension with intent to discharge. Pursuant to the grievance procedure required by the CBA, a Step I hearing was held on March 10, 2003, before the termination became effective. [D-18 (App 107-108); Addison-Eady Dep at 67-68 (App 328).] At that hearing, Addison-Eady claimed that he had told four supervisors or management personnel about his license suspension: Vincent Fenerty, Elijah Wooden, Mimi Stokes and Delores Starks.[3] [D-18 (App 107-108); Addison-Eady Dep at 82-83 (App 332).] (By his own account, Addison-Eady never told anyone that his suspension would continue through January 17, 2005.) [Addison-Eady Dep at 65 (App 327).]

Although not relevant for purposes of this Motion, the individuals identified by Addison-Eady did not corroborate his story. Fenerty, a Caucasian who was not involved in the termination or grievance process, denied Addison-Eady's claim. [D-18 (App 107-108); D-21 (App 119-121); see Fenerty Dep at 22 (App 371).] Starks, an African-American, also denied that Addison-Eady had ever notified her of his license suspension. [D-18 (App 107-108); D-21 (App 119-121); Addison-Eady Dep at 78-79 (App 331); see D-17 (App 106).] Stokes, a Caucasian, also denied Addison-Eady's statement (according to Addison-Eady, he did not tell Stokes until some time in mid 2002, well after he was aware of his suspension). [D-15 (App 104); D-18 (App 107-108); D-21 (App 119-121); Addison-Eady Dep at 49-51 (App 323-324).] Wooden, an African-American who supervised Addison-Eady briefly for a few days in January 2003 — long after Addison-Eady's suspension — only acknowledged that Addison-Eady had said, in response to Wooden's question about a driving beat, that he "couldn't drive," without any reference to a suspension. [D-16 (App 105); D-18 (App 107-108); D-21 (App 119-121).]

At the Step I hearing, Addison-Eady and the Union also contended that PPA had treated numerous other PEOs — African-American, Caucasian and Hispanic (without any suggestion of race discrimination) — less severely. [D-18 (App 107-108).] PPA denied that these other employees were comparable to Addison-Eady given the particular facts of his case. [Id.]

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[3]During his deposition testimony, Addison-Eady suggested that a "report" prepared by Barbara Dexter was submitted at the Step I hearing. [Addison-Eady Dep at 68-69 (App 328).] No such report by Barbara Dexter was ever received or produced by Addison-Eady; the contemporaneous record is clear that Addison-Eady did not claim he had told Dexter at any time before the Step II hearing. [D-18 (App 107-108); D-21 (App 119-121); Addison-Eady Dep at 83 (App 332).]

After evaluating the evidence presented at the Step I hearing, PPA denied the grievance and confirmed Addison-Eady's termination. The Union did not accept this outcome and, consistent with the grievance procedure, a Step II grievance hearing was held on March 26, 2003. [See D-21 (App 119-121).] At that time, Addison-Eady claimed that, in addition to the four individuals he had identified at the Step I hearing, he also had told Barbara Dexter, an African-American, about his license suspension some time during his stint on night shift from July through December 2003.[4] [Id.] Although Dexter corroborated Addison-Eady's statement, PPA rejected this as lacking credibility (Addison-Eady did not mention Dexter at the Step I hearing) and irrelevant since Dexter was not Addison-Eady's supervisor and Dexter had not reported the information to anyone else. [Id.] More important, even accepting the truth of Addison-Eady's statement to Dexter, it did not occur until at least seven months after Addison-Eady had been stopped for driving on a suspended license in November, 2001. [Id.] Accordingly, PPA again denied the grievance and confirmed Addison-Eady's termination. [Id.]

The Union submitted the grievance to Step III review by PPA's Executive Director, who also denied the grievance. [D-22 (App 122-123); D-23 (App 124); D-24 (App 125); D-25 (App 126).] The Union did not demand arbitration or further protest Addison-Eady's termination. [D-23 (App 124); D-25 (App 126); Addison-Eady Dep at 117-119 (App 340-341).] There is no evidence that Addison-Eady filed any formal claim against the Union in this regard. [Addison-Eady Dep at 119 (App 341).]

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[4]Again, although not relevant for purposes of this Motion, it bears note that in his verified Complaint filed with the PHRC, Addison-Eady only alleged that he had told one member of PPA management — Elijah Wooden. [D-19 at ¶ 11 (App 110); Addison-Eady Dep at 103-104 (App 337).] Subsequently, in response to PPA's discovery requests, Addison-Eady identified only four persons who he allegedly told about his license suspension: Wooden, Dexter (who Addison-Eady did not name until the Step II hearing) and two people he never named during the grievance process: Linda Kammer and Pat Davis. [D-1 at Response to Interrogatory No. 1 (App 1); Addison-Eady Dep at 104-106, 113-114 (App 337-340).] Addison-Eady did not state that he had notified Fenerty, Stokes or Starks, as he claimed — and as was denied by those persons — in the grievance process. [Id.; see D-18 (App 107-108).]

D. Addison-Eady's Claims.

Addison-Eady filed this lawsuit on September 17, 2004. He asserts two causes of action predicated upon his termination. In Count I of the Complaint, Addison-Eady contends that his termination was the product of race discrimination, in violation of 42 U.S.C. § 1981(a)("Section 1981"). In Count II of the Complaint, Addison-Eady claims that PPA terminated him in retaliation for his filing of the 2002 Charge, in violation of the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), and the analogous provisions of the Pennsylvania Human Relations Act, Act, 43 P.S. § 951 et seq. ("PHRA").

A R G U M E N T

A. Summary Judgment Standard.

Summary judgment is appropriate when the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), F.R.C.P. When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. See Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S.Ct. 1262 (1993). However, once the movant has demonstrated the absence of genuine issues of material fact, the non-moving party cannot merely rest on its pleadings. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Rule 56, F.R.C.P. Rather, the non-movant must "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A party opposing summary judgment must do more than rest upon mere allegations, general denials or vague statements. See Trap Rock Industries, Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

B. Addison-Eady's Race Discrimination Claim Fails As A Matter Of Law Because There Is No Evidence Suggesting That He Was Treated Differently On Account Of His Race.

As the Third Circuit has noted in the context of employment discrimination litigation, "'federal courts are not arbitral boards ruling on the strength of "cause" for discharge. The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination].'" Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (1997)(citation omitted). Consistent with this caution, under the familiar burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), in order for a plaintiff to establish a valid prima facie claim of race discrimination under Section 1981 — before there is any question as to the employer's justification for adverse employment action — a plaintiff must show (1) he is a member of a protected class, (2) he was qualified for his position, (3) he suffered an adverse employment action and, most significantly here, (4) members of the non-protected class were treated more favorably. Garcia v. Matthews, 2003 U.S.App.LEXIS 7967, *9 (3d Cir. April 25, 2003); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1992); Tucker v. Merck & Co., Inc., 2004 U.S.Dist. LEXIS 11222, *35 (E.D.Pa. June 17, 2004). Whether a plaintiff has established a prima facie case is a question of law to be decided by the Court. Sarullo v. United States Postal Service, 352 F.3d 789, 797 (3d Cir. 2003), cert. denied, 124 S.Ct. 2392 (2004).

With respect to the fourth element of a prima facie case, an employee identified by the plaintiff as a favored member of the non-protected class must be similarly situated to the plaintiff. Garcia v. Matthews, supra, 2003 U.S.App.LEXIS 7967 at *9; Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 359 (3d Cir. 1999); Tucker v. Merck & Co., Inc., supra, 2004 U.S.Dist.LEXIS 11222 at *29-30. Moreover, at the prima facie stage, "evidence of differential treatment of 'a single member of the non-protected class is insufficient to give rise to an inference of discrimination.'" Pivirotto v. Innovative Systems, Inc., supra, 191 F.3d at 359 (quoting Simpson v. Kay Jewelers, 142 F.3d 639, 646 (3d Cir. 1998)); see Ogden v. Keystone Residence, supra, 226 F.Supp.2d at 603.

This requirement is crucial in the context of disparate treatment cases such as this:

> "If the employee referenced by the plaintiff was not similarly situated to the plaintiff, pretext cannot be inferred, and the plaintiff's claim fails. Showing that an employee is similarly situated is no easy task: 'In order for employees to be deemed similarly situated, it has been determined that the individuals with whom the plaintiff seeks to compare [his or her] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" Ogden v. Keystone Residence, 226 F.Supp.2d 588, 603 (E.D.Pa. 2002)(citations omitted).

Here, Addison-Eady fails as a matter of law to establish a prima facie claim because he cannot demonstrate that he was treated less favorably than similarly situated Caucasian employees. There may be a factual dispute as to whether Addison-Eady gave prompt notice of his suspension. However, even viewed in a light most favorable to Addison-Eady, the record indicates that PPA treated Addison-Eady differently than both Caucasian and African-American employees. [D-1 at Response to Interrogatory No. 3 (App 2); see Addison-Eady Dep at 86-97 (App 333-335).]

When asked in written discovery to identify any employees who PPA did not terminate despite failure to maintain a license or a more serious driving offense (as alleged by Addison-Eady in Paragraph 15 of his Complaint), Addison-Eady listed 15 employees: 6 Caucasians, 2 Hispanics and 7 African-Americans.[5] [D-1 at Response to Interrogatory No. 3 (App 2).] When pressed to specify which of these employees were similarly situated but treated more favorably (i.e., PEOs who had failed to give notice of a license problem but not been terminated), Addison-Eady identified 2 Caucasians (Nick Antonio and Maureen Kelly) and 6 African-Americans (Charles Howell, Valerie Davis, Darryl Muchinson, Dwayne Davis, Annette Shadding and Celeste Brunson).[6] [Addison Eady Dep at 87-97 (App 333-335).]

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[5]In his Complaint, Addison-Eady focused extensively on Rick Dickson, as a purportedly favored Caucasian employee who was not terminated under similar circumstances. [Complaint, ¶¶ 14-16.] On March 29, 2004 — more than one year after the disciplinary action taken against Addison-Eady — Dickson, who then was PPA's Director of On-Street Parking (a member of upper management), was charged with driving under the influence of alcohol in connection with an incident in which several cars were damaged while Dickson was driving a PPA-owned vehicle and he refused a chemical test. [Dickson Dep at 9-16 (App 357-359); PPA's Supplemental Response to Interrogatory Nos. 5 and 6 and Request for Production No. 10 and attached documents (App 230-243).] Dickson ultimately served a six month license suspension and PPA suspended him for 30 days. [Id.] Given the undisputed evidence regarding PPA's purportedly favorable treatment of both Caucasians and African-Americans, any dispute relating to Dickson is irrelevant. However, as a matter of law, Dickson is not similarly situated to Addison-Eady, as (continued...)

One PEO singled out by Addison-Eady as an egregious case of someone treated more favorably than him — Annette Shadding, who failed to report two separate license suspensions and apparently drove PPA vehicles without a license, but was not terminated — is African-American, just like Addison-Eady:

> "And you have other ones here, like Annette Shadding, who had two infractions, driving Parking Authority vehicles while her license was suspended and was promoted. Was I treated differently? Yes. I feel as though I was treated differently." [Addison-Eady Dep at 137 (App 345); see also id. at 87-88 (App 333).]

When confronted with these simple facts, Addison-Eady confessed little understanding of the basis for any race discrimination claim:

> "Q. *** Mr.Addison-Eady, why do you think you were treated differently than all these other folks?
>
> "A. I can't tell you.
>
> "Q. In your Complaint you allege — one of the reasons you allege you think you were treated differently is because of race. I notice in this list that there appear to be several African-Americans

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[5](...continued)
there is no dispute that he never was a PEO or required to maintain a license as a condition of his employment and, most important, Dickson immediately notified PPA of his arrest and charge (even before his actual suspension). See Ogden v. Keystone Residence, supra, 226 F.Supp.2d at 603 (court granted summary judgment and held that plaintiff failed to establish prima facie discrimination claim where allegedly favored employee was not similarly situated).

[6]PPA's records reflect that only three similarly situated employees identified by Addison-Eady failed to report a license issue but were not terminated. Of these, two are African-American (Annette Shadding and Shawn Amos), and one is Caucasian (Maureen Kelly). [PPA's Responses to Second Set of Interrogatories (App 247-251) and attached documents for Shadding (App 260-272), Kelly (App 283-284) and Amos (App 298-308); see Fenerty Dep at 16-20 (App 369-370).]

> who, to your understanding, weren't terminated under similar circumstances, or actually [worse] circumstances because your understanding is those folks didn't come forward with any notice [of a license suspension]?
>
> * * *
>
> "A. Probably because I was a good shop steward.
>
> "Q. So you think the reason you were treated differently is because you were a shop steward.
>
> "A. No. I said I don't know. I said I hope that they didn't get the same because I think I was a good shop steward, I hope.
>
> "Q. What leads you to believe that it was race discrimination as the reason why you were treated differently than all these other people, some of whom are African-Americans? Are you aware of any evidence at all that supports your charge and allegation that you were treated differently because of your race?
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> * * *
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> "[A.] I'm not sure." [Addison-Eady Dep at 98-99 (App 336).]

Moreover, there is no dispute that PPA has terminated similarly situated PEOs — both African-Americans and Caucasians — for failure to report a license suspension. Specifically, PPA terminated Edward Henes and David Brazon, Caucasian PEOs, and Iris Hinton and Renault Samuel, African-American PEOs, after discovering that these employees had not reported license suspensions. [PPA's Responses to Second Set of Interrogatories and attached documents (App 247-310).]

Of the three members of PPA's management who issued Addison-Eady's suspension with intent to discharge, two are African-American (Delores Starks and Arlene Jones) and one is Caucasian (Edward Thornton). Further, Addison-Eady does not claim that he was replaced by a Caucasian PEO.

Given this record, Addison-Eady cannot prevail on a race discrimination claim as a matter of law. In similar circumstances, courts have not hesitated to grant summary judgment when a plaintiff fails to demonstrate that similarly situated members of the non-protected class are treated favorably. In such cases, as here, there is no evidence sufficient to give rise to any inference of discrimination, without regard to plaintiff's argument with the employer's stated justification for the adverse employment action.

In Tucker v. Merck & Co., Inc., supra, plaintiff ("Tucker"), an African-American, alleged that his employer ("Merck") discriminated against him on the basis of race, in violation of Section 1981, with respect to the imposition of various terms and conditions of employment, including with respect to his being required to sign an Alternative Work Agreement ("AWA"). The Court granted Merck's motion for summary judgment, holding that Tucker had failed to demonstrate that Merck had treated similarly situated Caucasians more favorably:

> "[Tucker] alleges that Jackie Lombardo, who also participated in the same MBA program as [Tucker], was not required to sign an Alternative Work Agreement. However, this cannot create an inference of discrimination as a matter of law. First, [Tucker] was not required to sign the AWA. When he refused to do so, the department did not force him, and he continued to attend classes and to receive educational assistance. Thus, he and Ms. Lombardo were treated equally. Further, Ms. Lombardo is not white as [Tucker] alleges, but is also a member of a protected class. She is Hispanic. Finally, [Tucker] must concede that there was a white employee, Mary Baker, who was required to sign the AWA, refuting any inference that [Tucker] was only required to sign because he was black. While [Tucker] claims that Ms. Baker was required to sign only as Merck's attempt to not appear to have been discriminating against him, the fact is that she signed the AWA and is a proper comparator in the required disparate treatment analysis." 2004 U.S.Dist.LEXIS 1122 at *37-38.

Likewise, the Court held that Tucker could not establish a prima facie claim merely by demonstrating that several Caucasian employees in the same department received better performance evaluations, as he failed to present any evidence that those employees were similarly situated (that is, that they had performed to the same level as Tucker but received superior evaluations). Id. at *40.

In Walden v. Saint Gobain Corp., 323 F.Supp.2d 637 (E.D.Pa. 2004), plaintiff ("Walden"), an African-American male, reported to his first day of work as a computer programmer at Saint Gobain wearing jeans and a flannel shirt and, after showing up for work at 2:00 a.m. the next day in the same clothes, slept in his car in the parking lot for 4 hours before he washed in the company's bathroom and started working. Several days later, Saint Gobain terminated Walden based on the conclusion that he was not going to fit the "corporate culture," citing his attire and sleeping in the parking lot. Walden filed a lawsuit alleging that Saint Gobain discriminated against him on the basis of race, claiming that Caucasian employees were treated favorably, and that the reference to Saint Gobain's "corporate culture" reflected discriminatory animus. The Court granted summary judgment and dismissed this claim, as Walden failed to present evidence that Caucasian employees were treated differently:

> "Even taking the evidence in the light most favorable to Walden, the circumstances of Walden's termination do not raise an inference of discrimination. Although Walden alleges disparate treatment, he fails to identify any similarly situated individuals or relate the circumstances of any other employees' treatment. This is a major and ultimately fatal deficiency in Walden's case. While Walden notes that Saint Gobain has (admittedly) never fired any other individuals for wearing improper attire, washing up in the office bathroom, or spending part of the night in the office parking lot, this is not evidence that gives rise to an inference of racial discrimination. Presented in a vacuum and without reference to how Saint Gobain has treated any similarly situated, non-African-American employees that engaged in the same conduct, this set of circumstances is not relevant to whether invidious discrimination — as opposed to an objection to Walden's conduct — motivated Saint Gobain's decision to discharge him." 323 F.Supp.2d at 643 (footnote omitted).

In Thomas v. Ethicon, Inc., 1994 U.S.Dist.LEXIS 5773 (E.D.Pa. May 5, 1994), plaintiff, an African-American male ("Thomas"), was terminated after he refused to submit to a psychiatric evaluation as a condition of extending a medical leave. The Court held that Thomas failed to establish a prima facie race discrimination claim and granted summary judgment given the absence of any evidence that the employer ("Ethicon") had treated Caucasians more favorably, particularly as Thomas was replaced by another African-American:

> "[Thomas] does not meet the framework established in McDonnell Douglas; because [Thomas'] replacement was another black, he has no evidence tending to show that non-members of a protected class were treated more favorably than he was. Moreover, Thomas has failed to adduce evidence to show that Ethicon's leave policy was applied differently to him than it has been to white employees. [Thomas] can only cite to certain instances where he felt mistreated and chose to attribute such treatment to racial discrimination. Conclusory allegations of this sort will not survive a motion for summary judgment. 1994 U.S.Dist. LEXIS 5773 at *17-18 (ciations omitted).

See Garcia v. Mathews, supra, 2003 U.S.App.LEXIS 7967 at *10 (Court affirmed summary judgment and dismissal of discrimination claim since "one cannot plausibly conclude that Garcia was treated less favorably than non-members of his class, and his prima facie case fails"); Martin v. Enterprise Rent-A-Car, 2003 U.S.Dist.LEXIS 1191, *16 (E.D.Pa. Jan. 16, 2003)(Court granted summary judgment and dismissed race discrimination claim for failure to promote; plaintiff failed to establish prima facie claim "as he does not show that similarly situated individuals from a non-protected class were promoted instead of him"); Ogden v. Keystone Residence, supra, 226 F.Supp.2d at 603 (Court granted summary judgment and dismissed discrimination claim where plaintiff failed to demonstrate that similarly situated non-members of protected class were treated more favorably); King v. School District of Philadelphia, 2001 U.S.Dist.LEXIS 10710, *14 (E.D.Pa. July 26, 2001)(Court granted summary judgment on race and gender discrimination claims as plaintiff's "conclusory and unsupported beliefs" that white or male teachers had been treated differently were "insufficient to create a genuine issue of material fact"); Childress v. Dover Downs, Inc., 2000 U.S.Dist. LEXIS 4881, *43 (D.Del. March 31, 2000), aff'd, 263 F.3d 157 (3d Cir. 2001)(court granted summary judgment and dismissed gender discrimination claim where plaintiff, a female, "failed to show that similarly situated males were treated more favorably and did not suffer adverse employment actions"; for example, record demonstrated that both males and females received counselings and received promotions).

Here, by his own admission, Addison-Eady claims that he was treated less favorably than similarly-situated Caucasians and African-Americans. To the extent PPA has made exceptions to its policy of terminating a PEO who does not promptly report a license suspension, such exceptions indisputably were made for both Caucasians and African-Americans (in fact, according to Addison-Eady, African-Americans are more frequently treated favorably). Conversely, it also is undisputed that PPA has terminated both African-Americans and Caucasians for the same reasons it terminated Addison-Eady. In sum, there is simply no evidence to permit any jury to conclude — even if it disbelieves PPA's justification for the termination — that PPA treated Addison-Eady differently on account of his race.

C. Addison-Eady's Retaliation Claim Fails As A Matter Of Law Because He Has Failed To Demonstrate A Causal Relationship Between His Prior Race Discrimination Charge And His Termination.

Title VII makes it an unlawful employment practice for any employer to discriminate against an employee because the employee has "made a charge, testified, assisted or participated in any manner in an investigation proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a).[7] To establish a prima facie retaliation claim — again, before there is any question as to the employer's justification — a plaintiff must show (1) he engaged in protected activity, (2) an adverse employment action and, again most important for these purposes, (3) a causal connection between plaintiff's participation in the protected activity and the adverse employment action. See Williams v. Philadelphia Housing Authority, 380 F.3d 751, 759 (3d Cir. 2004), cert. denied, 2005 U.S.LEXIS 2974 (April 4, 2005); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997); Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995).

"The mere fact that [an] adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events." Robinson v. City of Pittsburgh, supra, 120 F.3d at 1302. While a plaintiff may demonstrate a causal link by showing a temporal proximity between the protected activity and

[7]Addison-Eady's retaliation claims under the PHRA and Title VII are construed consistently. See Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996); Glickstein v. Neshaminy School District, 1999 U.S.Dist.LEXIS 727 (E.D.Pa. Jan. 26, 1999).

the adverse employment action, "the timing of the allegedly retaliatory action must be 'very close' or 'unusually suggestive' of retaliatory motive before a causal link will be inferred." Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 183 (3d Cir. 2003)(citation omitted). "In addition to temporal proximity, a plaintiff may present 'other types of circumstantial evidence,' such as evidence of a 'pattern of antagonism' occurring between the protected activity and the adverse action to support the inference of a causal relationship." Merit v. SEPTA, 315 F.Supp.2d 689, 707 (E.D.Pa. 2004), aff'd, 2005 U.S.App.LEXIS 2057 (3d Cir. Jan. 25, 2005)(citations and footnote omitted).

Here, Addison-Eady cannot show that there was a causal relationship between his protected activity (the 2002 PHRC Charge) and his termination. Addison-Eady's termination occurred over five months after the 2002 Charge, and over two months after he had exercised his seniority rights to return to the day shift, essentially resolving the substance of the 2002 Charge. Further, PPA conducted an investigation of all its employees' license status — not targeted at Addison-Eady — which revealed that Addison-Eady's license was suspended until January, 2005. Upon receiving this information, PPA issued a suspension with intent to discharge, as it consistently did in similar circumstances. This prompted the Union to file a grievance challenging this action, as it consistently did in similar circumstances. In this instance, after PPA denied the grievance through three steps of the contractual grievance procedure, notwithstanding Addison-Eady's claims, the Union elected not to pursue arbitration.

Moreover, Addison-Eady has presented no evidence that any of the decision-makers with respect to his termination — other than Rick Dickson, who denied the Union's grievance of Addison-Eady's termination at the Step II hearing — had any knowledge of the 2002 Charge, much less that they were motivated in any way to retaliate against Addison-Eady. Nor is there any evidence that PPA retaliated against any other employee who made a race discrimination complaint against PPA. [See Addison-Eady Dep at 138-139; PPA's Supplemental Response to Request for Production No. 7.]

There simply is no evidence of any retaliation against Addison-Eady following the 2002 Charge, but for the fact of the termination itself. Addison-Eady himself testified:

> "Q. Between September 13th of [2002, when the 2002 Charge was filed] and the time when you went out [injured on duty] in January of [2003], in that time frame, did anything happen which caused you to form some opinion or belief, either then or looking back on it now in hindsight, that you were treated differently, you suspect, because of you having filed a Complaint of race discrimination?
>
> "A. I don't know." [Addison-Eady Dep at 138].

In cases such as this, where there is delay of two or more months between the protected activity and the adverse employment action (here the gap is five months), and there is no other evidence of a causal connection, courts regularly dismiss retaliation claims as a matter of law. In such cases, summary judgment is granted as a result of the plaintiff's failure to establish a prima facie claim, and without regard to the employer's stated justification or any question of pretext.

In Williams v. Philadelphia Housing Authority, supra, plaintiff ("Williams"), a police officer employed by the Philadelphia Housing Authority ("PHA"), claimed that he was fired in retaliation for activity protected by the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"), and that PHA discriminated against him on the basis of a disability. With specific reference to his retaliation claim, Williams requested a transfer to PHA's radio room on October 21, 1998, as an accommodation for a mental condition which made him unable to carry a firearm. He was terminated approximately two months later, on December 29, 1998. Although the Third Circuit reversed the district court's grant of summary judgment in favor of PHA on Williams' underlying disability discrimination claim, it affirmed the dismissal of the retaliation claim given the lack of temporal proximity or any other evidence of retaliatory animus:

> "Here, over two months elapsed between the time Williams requested a radio room assignment and the time that he was terminated. In cases like this one, 'where "the temporal proximity is not so close as to be unduly suggestive," we have recognized that "timing plus other evidence may be an appropriate test...."' Williams has, however, put forth no other evidence suggesting that PHA terminated him because he requested a radio room assignment." 380 F.3d at 760 (emphasis and ellipses original, citations and footnote omitted).

In Pritchett v. Imperial Metal & Chem. Co., 1997 U.S.Dist.LEXIS 13841 (E.D.Pa. 1997), aff'd, 156 F.3d 1225 (3d Cir. 1998), the plaintiff claimed that he had been discriminated against on the basis of his race and then terminated in retaliation for filing a race discrimination charge with the PHRC. As here, the alleged retaliatory termination occurred well after the protected activity. On March 8, 1995, the employer received notice of plaintiff's PHRC charge. On May 19, 1995, the employer discharged plaintiff. The Court dismissed the retaliation claim, even though plaintiff had received disciplinary notices after the charge based on events which had occurred before the charge:

> "Plaintiff has offered nothing in addition to the timing of events to show causation. The proximity of events in this case is not sufficient alone to show causation. Two months passed between the date on which [the employer] was notified of plaintiff's complaint and any adverse action." Id. at *12-13.

Similarly, in Woods v. Bentsen, 889 F.Supp. 179 (E.D.Pa. 1995), plaintiff filed an EEOC complaint on November 4, 1992, contending that she was being harassed and discriminated against due to her recent inter-racial marriage. On April 22, 1993, plaintiff received a negative quarterly evaluation from her unit manager (contrasted with earlier favorable evaluations). The Court held that given a gap of over 4 months, temporal proximity could not be used to show a causal connection. 889 F.Supp. at 187-88. The Court also concluded that the fact that the employer had "watched" plaintiff more closely was not sufficient proof of retaliation. Id. at 188.

In Merit v. SEPTA, supra, plaintiff alleged that her transfer was in retaliation for activity protected under the ADA. The Court granted summary judgment and dismissed based on a six month gap between the protected activity and transfer, and the absence of any other evidence suggesting a causal connection or retaliatory motive:

> "Even taking the evidence in the light most favorable to Plaintiff, a reasonable jury could not infer that SEPTA transferred Plaintiff in retaliation for taking any protected activity. To start with, the temporal proximity between Plaintiff's protected activities and the November 19, 2000 decision to transfer is not particularly close.... Standing alone, this timing is not unusually suggestive of retaliatory motives.
>
> "Nor does Plaintiff present other circumstantial

> evidence giving rise to an inference of causation between her protected activities and the transfer. For example, it appears that the relevant SEPTA decisionmakers were unaware that Plaintiff had engaged in protected activity.... For her part, Plaintiff does not identify any individual as being responsible for her transfer. Such ambiguity in the record makes it difficult for the Court to scrutinize SEPTA's motivations in transferring Plaintiff, and by failing to present a triable issue of fact in this regard, Plaintiff fails to sustain her burden in opposing SEPTA's Motion for Summary Judgment.... [T]here is no evidence from which to conclude that SEPTA retaliated against Plaintiff by transferring her to the Frontier District." 315 F.Supp.2d at 707-708.

Significantly, the Court rejected plaintiff's reliance on alleged evidence of "antagonism," as such evidence also failed to give rise to any inference of a causal connection:

> "There is other circumstantial evidence that might support an inference of a causal connection, such as several instances of coworker antagonism toward Plaintiff. For example, her immediate supervisor, Ms. Johnson, intentionally harassed Plaintiff by smoking in the blockers booth, knowing it would aggravate Plaintiff's asthma and migraine headaches. The note posted inside the blockers booth suggests that Plaintiff's efforts to discourage smoking were dismissed and belittled as pesky meddling. SEPTA supervisors singled her out by (a) requiring her to wear steel-tipped boots, a requirement not imposed on other VRCs, and (b) removing her from double-shifts, thereby doubling her work-load. Yet, the critical inquiry is whether SEPTA took adverse employment action against Plaintiff because she had engaged in protected activity, as opposed to any other reasons. Plaintiff has failed to articulate how her coworkers' harassment — or any other circumstantial evidence of record — is causally related to SEPTA's decision to transfer her or discharge her. Id. at 709 (emphasis in original).

See also Johnson v. Souderton Area School District, 1997 U.S.Dist.LEXIS 4354 (E.D.Pa. 1997)(no causal connection demonstrated where 5 month gap occurred between protected activity and purported adverse action).

Here, given the delay of five months between the 2002 PHRC Charge and PPA's determination to suspend Addison-Eady with intent to discharge, and the lack of any evidence of retaliatory animus, Addison-Eady has failed to make out a prima facie retaliation claim.

CONCLUSION.

The civil rights laws do not permit a member of a protected class to reach a jury merely by claiming that the employer's grounds for a termination were false. This is precisely the reason why a plaintiff must establish a prima facie claim by producing some evidence that he was treated differently on account of his protected category or activity. Federal courts are not arbitration panels sitting to evaluate "just cause"; factual disputes regarding the employer's justification only have legal meaning as "pretext" when there is evidence which gives rise to at least an inference of unlawful discrimination or retaliation.

This is the fatal flaw of Addison-Eady's claims. There is no doubt a dispute as to whether or when Addison-Eady told anyone at PPA about his license suspension. There is also no doubt that PPA treated Addison-Eady differently than certain other employees — both Caucasian and African-American. However, the record is utterly lacking any evidence that PPA discriminated against Addison-Eady because of his race or earlier discrimination complaint. It is on those claims alone that Addison-Eady comes before this Court. For these reasons, PPA requests that the Court enter summary judgment and dismiss Addison-Eady's Complaint with prejudice.

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